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Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

BAXTER RICE, etc.,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*

BOHEMIAN DISTRIBUTING COMPANY,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*

WINE & SPIRITS WHOLESALERS OF CALIFORNIA,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*

Joint Brief of Petitioners Bohemian Distributing Company and Wine & Spirits Wholesalers of California in Reply to the Brief of the United States as Amicus Curiae.

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INTRODUCTION.

The United States has concluded that the decision below is both wrong and worthy of review by this Court and suggests summary reversal as an appropriate disposition of the case. (United States brief at 8, 20-21.) Petitioners concur. Alternatively, the United States suggests that the Court consider deferring a decision on the merits pending a final

resolution of certain issues of Oklahoma law. For the reasons discussed below, this alternative to an unqualified summary reversal of the decision below is not warranted.

DISCUSSION.

In its brief the United States correctly observes that the court below did not consider any evidence concerning the impact of California Business & Professions Code § 23672 ("the Designation Statute") on the marketing of distilled spirits in California. (United States brief at 15, n. 9.) The simple fact is that the Court of Appeal's decision turned solely on its determination that the Designation Statute, on its face, is preempted by § 1 of the Sherman Act. Because, as the United States asserts, that determination is "plainly incorrect," the decision below is wrong and should be summarily reversed at this time.

Postponement of decision on the merits of this case pending clarification of Oklahoma law would serve no useful purpose. It would continue indefinitely the doubt cast by the decision below on the designation statutes and primary source laws of other jurisdictions and would impair important California interests.[1]

No possible interpretation of Oklahoma's open wholesaling law by the Oklahoma courts could have any bearing whatever on the correctness of the decision below, for two reasons. *First*, contrary to the view of the United States (United States brief, *passim*), the Court of Appeal did not ground its decision on the existence of the "Oklahoma connection." Its invalidation of the Designation Statute was

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[1]Furthermore the open-wholesaling system, with its exportation features, is not an Oklahoma invention. For example, the Kansas legislature recently dropped its open wholesaling provision but exportation is still allowed "as permitted by law." (Kan. Stat. Ann. § 41-306.) Minnesota requires open wholesaling and only recently restricted exports by distributors. (Minn. Stat. Ann. § 340.145.)

expressed in sweeping terms, not dependent upon whether Oklahoma law does or does not permit brand owners contractually to restrict out-of-state sale of distilled spirits by Oklahoma wholesalers. *Second*, as stated in the United States brief, the California statute does not on its face violate the Sherman Act, and "[t]he result is the same if the California Designation Statute is analyzed without regard to the provisions of Oklahoma law . . ." (United States brief at 17, n. 14.)

It is true that an interpretation of Oklahoma law by the Oklahoma Supreme Court that permitted distillers to preclude Oklahoma wholesalers from selling outside that state would alleviate one of the problems which the Designation Statute is designed to solve. But the disappearance of the "Oklahoma connection" would neither eliminate the mischief done by the decision below nor otherwise warrant action by this Court that would leave the decision in effect for an indefinite period.

The most important reason why the petitions for certiorari should be granted is that the decision below is of nationwide significance. The Court of Appeal's analysis and application of the Sherman Act casts doubt upon the validity of the designation statutes or primary source laws in at least seventeen other states and the District of Columbia. Contrary to the suggestion in the brief of the United States (at 20, n. 18), the laws of at least three of those states — Connecticut, Illinois and Nebraska — are similar in substance and effect to California's Designation Statute. Those States require that wholesalers obtain the authorization of the brand owner or distiller to market his brands but, like California, do not expressly require that a designated wholesaler purchase only from the brand owner or distiller. (Conn. Gen. Stat. Ann. § 30-6; Ill. Ann. Stat. ch. 43, § 126; Neb. Rev. Stat. § 53-130.) These statutes are indistinguishable from

the Designation Statute for purposes of analysis under the federal antitrust laws.

There are some technical differences between the Designation Statute and the specific provisions of the primary source laws in the remaining fourteen states and the District of Columbia (cited in Appendix E to petition for certiorari of Wine and Spirits Wholesalers of California) However, all of those statutes are functionally the same for antitrust purposes, in that they facilitate the vertical imposition of pro-competitive restraints on wholesale distribution. (*Cf.* United States brief at 13.) The reasoning of the Court of Appeal applies to primary source laws as fully as it does to the Designation Statute.

The decision below should also be reversed now because it impairs important interests of California. Among other things, California has a legitimate interest in requiring that wholesalers be designated by distillers in order to facilitate monitoring of importation, to aid in the collection of excise taxes, and to reinforce, because of their perceived interbrand competitive advantages, the imposition of vertical restraints by distillers. (See discussion in United States brief at 19, n. 17.) Moreover, if decision of this case on the merits were delayed, California's interest in the immediate and continuing enforcement of the Designation Statute would be frustrated during the interim. The consequence would be the effective imposition upon California, each day that the decision of the Court of Appeal continued in effect, of an alien system of liquor importation and wholesaling, destructive of California's longstanding method of distribution reflected in the Designation Statute. Under these circumstances, a declination to resolve immediately the antitrust issues presented in this case could be justified, if at all, only if a

decision on the merits were dependent on the meaning of Oklahoma law.[2] As we have shown, it is not.

Moreover, if Oklahoma law were ultimately to be interpreted to permit the enforcement in Oklahoma of private agreements restricting resale by Oklahoma wholesalers to California importers, this would provide no guarantee that Oklahoma wholesalers would refrain from breaching those agreements. Similarly, wholesalers in other states may surreptitiously sell distilled spirits to nondesignated importers in California in violation of agreements with distillers prohibiting such sales. The decision of the Court of Appeal deprives California of the capability of protecting itself, through enforcement of the Designation Statute, against such forbidden importations. Surely California cannot be relegated, on the basis of a mistaken interpretation of the federal antitrust laws, to reliance upon private actions by distillers in other states to prevent sales to nondesignated California importers. Neither should California be subject to the potential disruptive effect of future legislation of any other state, including Oklahoma. Furthermore, failure to reverse the decision below could well constitute a disservice to the Federal Government. The United States recognizes that California's enforcement of private vertical restraints through the Designation Statute may "further rather than

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[2]*Cf. Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) ("Where . . . it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States' "); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964) (Abstention unwarranted where the parties did not request it and where the litigation was already long delayed); *Harmon v. Forssenius*, 380 U.S. 528, 537 (1965) (The refusal of a federal district court to abstain was not error "[g]iven the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals").

conflict with federal antitrust policy." (United States brief at 17, n. 14.)[3]

Conclusion.

The appropriate action for the Court to take in this case is to grant the petitions for certiorari and reverse the decision below summarily.

If the Court should decline to take that action, the next most appropriate action would be to grant the petitions for certiorari and set the case for plenary adjudication.

If the Court should decline to decide this case on the merits at this time, the appropriate action would then be to grant the petitions for certiorari, vacate the judgment below, and remand to the California Court of Appeal for further consideration in light of the United States' analysis of the antitrust issues.

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[3]The United States notes, correctly, that because the Designation Statute does not conflict with the Sherman Act, this Court need not consider whether the statute is insulated from invalidity by the state action exemption or the Twenty-first Amendment. (United States brief at 19.) The reasons why, if those issues were reached, the petitions for certiorari should be granted and the decision below reversed are set forth in the petition for certiorari of Wine & Spirits Wholesalers of California at 20 (state action exemption) and 21-25 (Twenty-first Amendment).

As we have shown, no useful purpose would be served by delaying the resolution of this case pending clarification of the law of Oklahoma.

Respectfully submitted,

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